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No. 85-2069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SEYMOUR WEXLER and DAISY WEXLER,
individually and on behalf of their child, DOUGLAS WEXLER,

Petitioners,

—v.—

WESTFIELD BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the judgment of the District Court dismissing the petitioners' complaint seeking reimbursement for educational costs for their son.

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OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. 1a-15a), the District Court (Pet. App. 34a-70a), the Office of Administrative Law of New Jersey (Pet. App. 22a-33a) and the judgment of the Circuit Court (Pet. App. 71a-72a), the order of the Circuit Court (Pet. App. 73a-74a), the New Jersey Commissioner's Hearing Examiner Report (Res. App. A1-A7) and the New Jersey Department of Education Classification Officer's Decision (Res. App. A8-A11) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered February 19, 1986 (Pet. App. 71a-72a). A petition for rehearing was denied March 18, 1986 (Pet. App. 74a). Jurisdiction is invoked under 28 USC 1254 (1).

STATEMENT

The Complaint filed by Seymour Wexler and Daisy Wexler in the United States District Court July 26, 1983, followed three decisions dismissing the matter on the merits, New Jersey Commissioner's Hearing Examiner Report March 11, 1977 (Res. App. A1-A7), New Jersey Department of Education Classification Officer's Decision February 5, 1979 (Res. App. A8-A11) and New Jersey Administrative Law Decision June 9, 1983 (Pet. App. 221-33a).

The matter has also been before the courts on procedural questions, primarily resulting from the constant changes in the law and interpretation of applicable procedural regulations. In March 1983, the Appellate Division of the New Jersey Superior Court remanded the matter to the Commissioner of Education "for the purpose of providing an impartial due process hearing before an administrative law judge consistent with the federal act. . ." (Pet. App. 21a).

Thereafter, the "due process hearing" was held and the petition was denied by order of Judge Thomas E. Clancy of the Office of Administrative Law of New Jersey dated June 9, 1983 (Pet. App. 32a-33a). The District Court in an opinion dated November 27, 1984, dismissed the Complaint (Pet. App. 69a). The opinion by District Court Frederick B. Lacey contains a comprehensive review of the facts supporting the Court's findings that:

(a) the 1972 classification of Douglas Wexler as "mentally retarded educable" was appropriate (Pet. App. 62a) and

(b) a proper program for Douglas Wexler was available within the Westfield Public School System (Pet. App. 64a).

The petitioners' contention that the Courts below "erroneously refused to apply the higher New Jersey standard of educational opportunity for handicapped pupils" is itself erroneous. The Circuit Court specifically referred to the applicable standard of review:

> ". . . our review, while plenary, must be conducted within the general framework of deference to state decision-makers dictated by EAHCA and Rowley itself. Courts must evaluate a classification and IEP in light of "Congress's express efforts to place on local and state agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child." (Pet. App. 9a)

The petitioners contend that they were not accorded an independent *de novo* assessment of the evidence. The trial before the Administrative Law Judge in May, 1983, afforded petitioners an opportunity to present all of the pertinent evidence with respect to the classification of their son. The petitioners testified at the trial and the Administrative Law Judge found that neither "checked into [the] particulars of a specific educational program formulated for their son" (Pet. App. 26a). The Judge further cited testimony of the petitioner, Daisy Wexler, that she objected to the reclassification because of "the label of mentally retarded."

At page 15 of petitioners' Brief, emphasis has been placed on the words "arbitrary, capricious, and unreasonable" in an attempt to impeach the OAL decision. The paragraph in which those words appear should be read in its entire context including the statements that:

> "The Westfield Board of Education acted in an appropriate fashion and was duly circumspect diligent and conscientious at all times," and "in short, there was nothing irregular or abusive in its action." (Pet. App. 27a)

There are two comments on page 15 of petitioners' Brief which are irregular and should be disregarded:

(1) The "shock and dismay" of the parents is nowhere a part of the record.

(2) The footnote 11 is the first reference in the record to the "expertise" of the OAL Judge. The petitioners never heretofore questioned the ability of the OAL Judge, his expertise or his competence.

There is no basis for the contention that the Court of Appeals erred in affirming the District Court's finding that the respondent's responsibility for Douglas Wexler's education was completed when he was "properly graduated" and given a diploma from the Westfield Board of Education (Pet. App. 67a). The Court of Appeals specifically cited the District Court's finding (Pet. App. 12a) and rejected the theory that Section 1412(2)(B) creates "an absolute duty" to provide post graduate education for a handicapped student.

District Court Judge Lacey succinctly set forth the issues of this matter:

> "The initial determination to be made by the court is whether Douglas Wexler's classification in 1972 as "mentally retarded-educable" was proper. A second issue is the availability of a proper program for Douglas Wexler within the Westfield School system." (Pet. App. 56a)

The Circuit Court affirmed the District Court's findings and stated that basis for dismissal of the complaint:

> "In this case, Douglas received the education his parents thought best. Westfield made available to Douglas the free appropriate education required by the EAHCA and may not be held financially accountable for the Wexlers' decision to educate him elsewhere. The judgment of the district court will be affirmed." (Pet. App. 14a)

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July ____, 1986

APPENDICES

APPENDIX A

Report of New Jersey Commissioner of Education Hearing Examiner Dated March 18, 1977

HEARING EXAMINER REPORT

"S.W." and "D.W.,"

Petitioners,

—v.—

BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,

Respondent.

For the Petitioners,
SCHECHNER AND TARGAN (David Schechner, Esq., *of Counsel*)

For the Respondent,
NICHOLAS, THOMAS & PEEK (William D. Peek, Esq., *of Counsel*)

Petitioners, residents of Westfield, aver that their son, D.W., a pupil now enrolled in the private Midland School, was improperly classified in 1972 by the Westfield Board of Education, hereinafter "Board," and that his private school tuition costs for the years 1972-73 through 1975-76 at the Midland School should be borne by the Board. They request the Commissioner of Education to alter the classification, to correct the records of D.W. and to continue him in the private school at public expense or, in the alternative, to place him in

an appropriate program in Westfield. The Board denies that its classification or placement of D.W. was in error and it moves for dismissal of the Petition.

A hearing was conducted on July 8, 1976 at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner. The submission of Briefs by the parties was completed on February 1, 1977. The report of the hearing examiner is as follows:

D.W. was born in February 1963, and in 1968 was placed by the Board as a communication disabled-perceptually impaired pupil in the private Midland School. Tuition costs in that year and to June 1972, were paid by the Board.

In 1972 D.W. was retested by the Board and reclassified as mentally retarded-educable and assigned by the Board to an appropriate class in the Westfield School System for pupils with such classification during the 1972-73 academic year. Petitioners thereupon informed the Board that they would not accept the proposed placement but would continue D.W. as a pupil in the Midland School.

D.W. continued as a pupil in the Midland School during the school years 1972-73 through 1974-75 but in 1975 he was again enrolled by petitioners in the Westfield Schools and was again assigned to an educable class. Petitioners again refused his placement in such class and D.W. has been continued as a pupil in the Midland School. At this juncture they formally protest the classification of D.W. as mentally retarded and aver that his classification and school placement should be altered retroactively to a classification and placement appropriate to a pupil who is neurologically impaired. Their Petition of Appeal also requests the Commissioner to "***adequately reimburse them for the tuition and cost of transportation paid for their child during the period from 1972 to date***" when D.W. was educated at their expense. (Petition of Appeal, at p. 5)

Thus, the Petition of Appeal is principally premised on an argument that the Board erred in 1972 when its child study team reclassified D.W. and that the ensuing tuition costs paid by petitioners were and are payable by the Board. The hearing

was primarily concerned with testimony pertinent to the controverted classification of D.W. A total of nine exhibits were stipulated in evidence. The hearing examiner proposes to excerpt or cite such exhibits at the outset since they served as the foundation upon which the testimony at the hearing was founded.

Exhibit P-1—This Exhibit is a letter from Dr. Avrum Katcher, Director, Child Evaluation Center, Hunterdon Medical Center, to petitioners on November 24, 1975. The letter summarizes the findings of prior examinations of D.W. by the other physicians and sets forth Dr. Katcher's own test results and conclusions. Of importance to the instant adjudication Dr. Katcher states:

> "***I feel that [D.W.] is a physically normally developed and nourished boy of 11 years and 9 months. He has a static encephalopathy secondary to gestational factors related to prematurity. This includes what amounts almost to an atonic diplegia, multiple severe cognitive difficulties, an expressive and possible receptive language disorder. He probably has dull or very low average potential. I suspect he is not really retarded.***" (P-1, at p. 3)

Exhibit P-2—This Exhibit is a complete compilation of the records of D.W. in the Midland School. The cover document of the report dated August 15, 1974, and written by a learning disabilities teacher-consultant states that:

> "***Throughout his stay at Midland, [D.W.] has made slow but steady progress.***"

Such statement is subsequent to a quotation from a report of the Westfield Child Study Team which indicated that D.W. had "***few areas of strength***" to compensate for "limitations" attributable to "organic involvement." Although this letter of the learning disabilities teacher acknowledges that D.W. may be "***functionally retarded as far as his ability to perform***" on a test, such ability "***may very well be influenced by his perceptual and neurological impairment and his delayed language development.***" (P-2, at page 4)

Exhibit P-3—This Exhibit is a compendium of reports of medical personnel who performed a variety of examinations of D.W. in the years 1968-1974, and of teaching staff members of the Westfield Schools employed as members of the Board's Child Study Team. Included are the results of several Wechsler Intelligence Scale (WISC) and other examinations: i.e., in 1972:

Verbal Scale I.Q.	76
Performance Scale I.Q.	55
Full Scale I.Q.	63

Against such test results, which the Westfield Child Study Team interpreted to mean that D.W. was functioning in the "***mental defective (educable) range***" there is the report of Dr. Gail Solomon which states:

> "***I feel strongly that this boy has normal or borderline normal intelligence and should be given every benefit or special education in small classes for brain injured children and not be placed with retarded children since he is not retarded.***" (Letter of Dr. Gail E. Solomon, at p. 3)

Exhibit P-4 is a chronicle of the efforts of the Westfield School System to classify and place D.W. The document itemizes the "conflicting opinions" with respect to the primary classification.

Exhibits R-1, 2, 3—These Exhibits attest to the specificity of D.W.'s classification by the Westfield Child Study Team as:

	Multiply Handicapped
Primary:	Mentally Retarded - Educable
Secondary:	Neurologically Impaired

Such excerpts from the extensive documentation serve to emphasize the dichotomy of views concerned with the classification of D.W. On the one hand there are opinions that there is clear evidence of neurological impairment of D.W. and that such evidence should constitute the principal basis for classification and placement. On the other hand there are opinions that there is no evidence of neurological impairment, or only

slight evidence, as the primary cause of learning difficulty and that the difficulty, per se, as evidenced particularly by objective tests, must stand as the single most important factor in the classification equation.

These views received amplification at the hearing from Dr. Katcher and from the Director of the Board's Child Study Team.

Dr. Katcher testified that he believed D.W. had a "diffuse brain abnormality" as the result of brain damage and that such belief was primarily based on abnormalities in the retina of the eye. (Tr. 17-18) He said that these abnormalities had:

> "***not produced mental retardation but that his [D.W.] intelligence testing may, to some extent, mimic mental retardation because of the neurologic abnormalities which he has, and I believe, therefore, that, to be responsible for a classification on him, if I were to be charged with that responsibility, I would have said the appropriate classification would be neurologically impaired first and communicationally handicapped second.***" (Tr. 19)

Dr. Katcher did admit, on cross-examination that the specific delineation of disability or handicap was often difficult and that a categorization might, without error, involve more than one disability. (Tr. 35)

The Director of the Board's Child Study Team testified that the team considered the WISC tests as more authoritative than those administered elsewhere in terms of mental capacity (Tr. 54) and said the team was of the opinion that such data and other reports indicated that most of the problems of D.W. "***[were] in the area of educability.***" (Tr. 52) He said:

> "***We thought that the neurological involvement may be a cause for this educability.***"

He also testified that the team had concluded the "***educable mental retardation of this youngster was the primary concern.***" (Tr. 56)

The principal issue of this matter is indeed just this categorization of the "primary concern" since even petitioners' expert

witness is in agreement on the Board's first classification of D.W. as "multiply handicapped." (R-3) As Dr. Katcher testified:

> "***I'm willing to agree that this child could be classified as multiply handicapped, but not with these primary and secondary classifications***." (Tr. 44)

(Such "primary" and "secondary" classifications as noted *ante* were "mentally retarded - educable" and "neurologically impaired.") (R-3)

Petitioners aver that such testimony and the total record of great proportions sustain their claim that D.W. has during all of the period 1972-77 been incorrectly classified by the Board and that the placements the Board proposed for him were inappropriate.

The Board avers it has conscientiously reviewed the total record of D.W. and that its classification of him was correctly founded in all the available data. It cites decisions of the Commissioner to support an avowal that in such circumstances there is no authority for intervention by the Commissioner and no liability imposed on the Board as the result of petitioners' withdrawal of D.W. from the Westfield public schools. *Malcolm and Ina Woodstein v. Board of Education of the Township of Clark, Union County*, 1970 *S.L.D.* 220, aff'd State Board of Education 1971 *S.L.D.* 662; *"K.K." v. Board of Education of the Town of Weatfield, Union County*, 1971 *S.L.D.* 234, rem State Board of Education 240, decision on remand 1973 *S.L.D.* 30, aff'd State Board of Education 34, aff'd Docket No. A-1125-73 New Jersey Superior Court, Appellate Division, February 13, 1975

The hearing examiner has reviewed all such arguments in the context of the factual record stipulated by the parties and the testimony of the hearing and finds no clearly discernible proof that the classification and recommended placement of D.W. has ever been or is now in classifiable error. The proof is, in fact, to the contrary and in favor of the Board's Child Study Team which carefully and in great detail over a long period of time weighed conflicting medical advice and balanced such

advice with its own professional component opinion in the mandated classification procedure. The team was a complete one, consisting of the school psychologist, social worker, supervisor of nurses, school physician and the learning disabilities-teacher consultant. (Tr. 62) The judgments it made with respect to classification were reasoned ones based on data which was contradictory in part and which could not be held to support one conclusion alone to the exclusion of all others but, on the other hand, deserve support in the absence of evidence that discretion was abused. Reasonable, professional persons may differ over the conclusions they reach, as indeed they do herein in part, but such differences cannot logically be held to constitute error when there is significant reason or justification in support of such conclusions. There is ample reason in support of the controverted classification of D.W. and the hearing examiner recommends that it be determined valid.

In the context of such determination there can be no finding that petitioners are entitled to the tuition costs or other expenses that they seek. D.W. was voluntarily withdrawn in 1972 from the Westfield School System and entered in a private school. While petitioners were free to make such placement, there is no obligation on the Board for an expenditure of public funds. As the Commissioner said in *Woodstein*, *supra*:

> "***While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice.***"

The hearing examiner recommends, therefore, that the Petition be dismissed.

This concludes the report of the hearing examiner.

March 18, 1977

APPENDIX B

Report of Classification Officer of New Jersey Department of Education Dated February 5, 1979

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
Division of School Programs Branch of Special Education & Pupil Personnel Services

MR. AND MRS. SEYMOUR WEXLER
952 WYANDOTTE TRAIL
WESTFIELD, NEW JERSEY

In behalf of their son, "D.W.,"

Petitioners,

—v.—

BOARD OF EDUCATION OF THE
TOWN OF WESTFIELD, UNION COUNTY,

Respondent.

CLASSIFICATION OFFICER'S DECISION

APPEARANCES:

For the Petitioners,
SCHECHNER AND TARGAN (David Schechner, Esq., *of Counsel*)

For the Respondent,
NICHOLS, THOMSON, PEEK & MEYERS (William D. Peek, Esq., *of Counsel*)

Kenneth A. Koehly
Chief Classification Officer

Case # 78-167

Date February 5, 1979

STATEMENT OF THE ISSUES

This matter was initially heard by a hearing examiner for the Commissioner of Education on July 8, 1976. In *"S.W." and "D.W." v. Board of Education of Town of Westfield*, 1977 *S.L.D.* ____ (decided June 10, 1977), the Commissioner dismissed the petition. Upon appeal to the New Jersey Superior Court, Appellate Division, the State Board of Education was ordered to re-examine its position regarding its denial of an appeal. On March 1, 1978 the State Board ordered the matter remanded to a hearing examiner for a *de novo* determination of the classification of D.W., a handicapped pupil.

This classification officer found the record and evidence lacking sufficient information to apply the usual standards of a *de novo* determination and on November 21, 1978 convened a new hearing in the matter. All evidence in this hearing was identical to that provided in the original proceeding. Additional testimony was taken from respondent's school psychologist and the director of special education.

Specifically, petitioners challenge the accuracy of the classification established for D.W. by respondent's basic child study team. Respondent contends today, as it did in July 1976, that the classification is correct in all respects.

FINDINGS OF FACT

D.W. was initially classified by respondent's basic child study team in June 1968 as communications disordered-perceptually impaired and placed in an eligible private school for handicapped pupils. In June 1972 respondent's basic child study team reclassified D.W. as educable mentally retarded (EMR) and recommended placement in a respondent's class for EMR pupils. Respondent's child study team subsequently

affirmed its classification findings in March 1973 and again in November 1974.

It is found that D.W. was provided a comprehensive evaluation leading to the child study team's conclusions of October 1974. These evaluations included a psychological examination (P-3U), an educational assessment (P-3W), a social history (P-3V) and a medical examination (P-3T). All led to the conclusion that D.W. is educationally handicapped.

The records contain a long list of tests and evaluations completed over the years. All psychological evaluations reflect depressed intelligence scores particularly in the performance areas. None lists a specific and definable central nervous dysfunction. D.W.'s verbal intelligence scores have decreased from a score of 95 in 1968 (P-6) to 79 in 1974 (P-3U).

This classification officer is charged with determining the accuracy of the classification at the time of the initial hearing. No evidence or testimony relates to information gained later than July 8, 1976.

CONCLUSIONS

With the exception of one consistent island of strength, D.W.'s performance on the Wexler Intelligence Scale for Children is well below average. In this instance the strength lies in the subtest entitled "Similarities" which tests the ability to deal with abstracts. This ability is an area specifically addressed among those to be considered in determining mental retardation. Other data suggests this strength is isolated and not related to D.W.'s performance in other areas. Typically the subtest of Similarities requires the subject to call upon other resources beyond simply drawing abstractions. Vocabulary and comprehension are examples of two such areas from which information must be drawn in order to draw similarities. Comparison of the subtest scores shows a lack of any correlation. A review of the progress reports of the private school indicate that growth in that setting has been minimal (R-4).

For educational purposes, D.W.'s handicap must be considered from an educational standpoint. The medical cause of

D.W.'s functional retardation may be due to neurological impairment, although medical professionals appear to disagree in their determination of any neurological involvement. It is this classification officer's determination that for educational purposes, D.W. is educable mentally retarded and in need of special class placement for educable mentally retarded pupils.

This decision is based upon a *de novo* consideration of the evidence and testimony presented at the hearings convened on both July 8, 1976 and on November 21, 1978. This decision shall be binding on all parties to the dispute and shall be implemented without delay. No stay of this decision, or any subsequent decision rendered on appeal, shall be granted pending appeal unless appellant demonstrates a likelihood of prevailing on appeal and unless implementation will harm the pupil or other pupils. Application for a stay is to be made first to the body rendering the decision being appealed. If denied, such application may thereafter be made to the body to which an appeal is taken. Any party may appeal this decision to the State Board of Education. The decision of the State Board of Education may be appealed to the New Jersey Superior Court, Appellate Division.

/s/ KENNETH A. KOEHLY

Kenneth A. Koehly
Chief Classification Officer
New Jersey Department of Education
Division of School Programs
Branch of Special Education and
Pupil Personnel Services